Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1979

No. 79-84

WILLIAM A. GARRETT,
Petitioner

vs.

PEOPLE OF THE STATE OF OHIO,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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THE OHIO SUPREME COURT BY ITS REFUSAL TO EVEN HEAR PETITIONER'S APPEAL HAS SET IN MOTION A DECISION TO CIRCUMVENT THE LANDMARK DECISION OF *POINTER VS. TEXAS*, 380 US 400 AND EFFECTIVELY DENY PETITIONER AND FUTURE DEFENDANTS IN CRIMINAL, FELONY, AND MISDEMEANOR CASES TO BE CONFRONTED WITH THEIR ACCUSERS AND THEIR RIGHT TO CROSS EXAMINE THEIR ACCUSERS. SHOULD THIS COURT REFUSE TO ALTER THE OHIO SUPREME COURT'S AND COURT OF APPEALS' DECISIONS, THE CITIZENS OF THE STATE OF OHIO IN BOTH FELONY AND MISDEMEANOR CASES WILL HAVE PURE HEARSAY DOCUMENTS ADMITTED INTO EVIDENCE TO ESTABLISH THEIR GUILT AND PETITIONER AND FUTURE DEFENDANTS WILL BE PROHIBITED FROM CONFRONTING THEIR ACCUSERS AND CROSS EXAMINING THEM.

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No.

WILLIAM A. GARRETT,
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vs.

PEOPLE OF THE STATE OF OHIO,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The Petitioner, William A. Garrett, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered on April 23, 1979.

I

OPINIONS BELOW

The unpublished opinion and judgment of the Supreme Court of Ohio, File No. 79-323, is set out in full in Appendix A.

The opinion of the Court of Appeals, Lucas County, Ohio unpublished is set out in full in Appendix B.

II

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). This Petition is being filed within 90 days of the final order below, entered April 23, 1979.

III

QUESTION PRESENTED

One question is presented, even though the charge is a driving under the influence offense which is a six month misdemeanor offense. Can the State of Ohio deny petitioner's sixth amendment right of confronting and cross-examining his accuser by allowing a hearsay document into evidence over petitioner's objection to attempt to prove petitioner's guilt?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of he State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law;

nor deny any person within its jurisdiction the equal protection of the laws.

V.

STATEMENT OF THE CASE

Petitioner, William A. Garrett, was driving his automobile north bound on US Route 23 when he was stopped by Officer James Walker of the Ohio State Highway Patrol on or about the evening of Tuesday, October 4, 1977, and charged with the vehicular offense of Driving While Intoxicated pursuant to ORC 4511.19.

Further, petitioner was administered an intoxilyzer breath test and tested at .16 pursuant to the Implied Consent Statute, ORC 4511.19.1. Subsequently, jury trial was scheduled for February 28, 1978 in Sylvania Municipal Court before the Honorable William Erb, Sylvania Municipal Judge.

On February 28, 1978 petitioner was found guilty of Driving Under the Influence of Liquor by the jury. Petitioner filed a motion for a new trial and an amended motion for new trial. On April 3, 1978 petitioner's motion for new trial was denied and petitioner was sentenced to serve three (3) days in jail and received fine and costs totalling $293.00 and his driving privileges were suspended in the State of Ohio for thirty (30) days. On April 3, 1978 petitioner filed his Notice of Appeal.

On February 9, 1979 the Court of Appeals affirmed petitioner's conviction and the matter was remanded back to the Sylvania Municipal Court for sentencing. On February 16, 1979 petitioner filed a motion with the Sylvania Municipal Court to stay execution of sentence and continue appellant's personal recognizance bond to seek leave to appeal to the Supreme Court of Ohio. On February 16, 1979 the Sylvania Municipal Court granted

petitioner's motion to stay execution of sentence and continue his personal recognizance bond to permit petitioner to bring the appeal to the Supreme Court of Ohio. Thereafter, on February 26, 1979 petitioner filed his notice of appeal with the Lucas County Court of Appeals.

On or about February 26, 1979 petitioner filed a brief in support of jurisdiction requesting that the Ohio Supreme Court grant leave to appeal. On April 23, 1979 the Ohio Supreme Court denied levae to appeal. Petitioner on the 30th day of April, 1979 obtained a stay of execution of sentence from the trial court, Sylvania Municipal Court, Lucas County, Ohio.

During the course of the trial a heresay document was introduced into evidence over petitioner's objection purporting that the breath testing device, to wit, an Omicron Intoxilyzer was in good working order and properly calibrated. Petitioner, in the body of this brief, will go into greater detail.

VI

ASSERTION AND PRESERVATION OF THE FEDERAL CLAIM

During the course of petitioner's trial on February 28, 1978 the People introduced evidence of an intoxilyzer breath test which was administered to petitioner after his arrest. (See transcript Page 39)

Petitioner objected to the admission into evidence of the test for various reasons including that the People did not show by proper foundation that the intoxilyzer was in proper working condition. (See transcript Pages 37-39)

During the course of trial, Officer James Walker, the only witness produced the intoxilyzer test to petitioner, he performed a simulator test on intoxilyzer #001162 and

received a reading of 0.106 using a simulator solution prepared by the Ohio Department of Health, Batch No. 77-05, Bottle No. 77-48-05. At the trial, Exhibit No. 3 was introduced by the People over petitioner's objection and admitted into evidence by the trial court. (See transcript Page 37) Said exhibit was an affidavit signed by Trooper Robert W. Gochoel, Jr., a chemist and laboratory technician of the State of Ohio Department of Health, dated September 15, 1977 which said affidavit stated in Part:

> "This calibration solution contains 1/23 mg/ml ethyl alcohol in distilled water and when used according to manufacturer's stated methods will produce a reading of 0.102% blood alcohol in the above named breath testing instrument when that instrument is in proper working condition for a period of three (3) months from the date of first use."

On Page 37 of the transcript the People introduced Exhibit No. 3 into evidence. This document was used to illustrate that the simulator was prepared and checked out by the Ohio Department of Health within the 90-day prescribed period and the affidavit was signed by a Trooper Robert W. Gochoel, Jr. On Page 37 of the transcript it reads in part as follows:

> Q Mr. Walker, I'm showing you what's been marked as State's exhibit three and asking you if you can identify it.
>
> A This is a record of analysis of the calibration solution and the batch number and bottle number is 77-48-05, and it was prepared for the

Toledo Post of Ohio State Patrol on the thirtieth of August, 1977.

Q And what is the percentage of alcohol in that simular solution?

MR. GARRETT: I'm going to have an objection at this point. Excuse me, Mr. Ramey. This is a piece of paper signed by somebody from the department, supposedly the Department of Health. I feel that they are going to rely on the simulator to show that this so-called machine is going to be a functioning, good-working machine that that individual from down here testified to the jury that he checked that batch out. And I would respectfully move to strike any further testimony from the contents of that affidavit as it is nothing more than pure heresay. And I don't have a right to cross examine a piece of paper. I can't very well do that effectively, Your Honor.

THE COURT: Your objection is overruled. You may proceed.

Petitioner contends that Exhibit No. 3 was nothing more than a hearsay document. Petitioner could not cross examine the deponent and was denied his constitutional right to confront his accusers.

Petitioner's constitutional claim was renewed before the Lucas County Court of Appeals along with several other state arguments. The Court of Appeals affirmed petitioner's conviction and the Ohio Supreme Court on April 23, 1979 denied petitioner's leave to appeal stating no constitutional questions were presented.

VII

REASON FOR GRANTING THE WRIT

THE OHIO SUPREME COURT BY ITS REFUSAL TO EVEN HEAR PETITIONER'S APPEAL HAS SET IN MOTION A DECISION TO CIRCUMVENT THE LANDMARK DECISION OF *POINTER VS. TEXAS*, 380 US 400 AND EFFECTIVELY DENY PETITIONER AND FUTURE DEFENDANTS IN CRIMINAL, FELONY, AND MISDEMEANOR CASES TO BE CONFRONTED WITH THEIR ACCUSERS AND THEIR RIGHT TO CROSS EXAMINE THEIR ACCUSERS. SHOULD THIS COURT REFUSE TO ALTER THE OHIO SUPREME COURT'S AND COURT OF APPEALS' DECISIONS, THE CITIZENS OF THE STATE OF OHIO IN BOTH FELONY AND MISDEMEANOR CASES WILL HAVE PURE HEARSAY DOCUMENTS ADMITTED INTO EVIDENCE TO ESTABLISH THEIR GUILT AND PETITIONER AND FUTURE DEFENDANTS WILL BE PROHIBITED FROM CONFRONTING THEIR ACCUSERS AND CROSS EXAMINING THEM.

The central issue of this appeal is the admission of a hearsay document into evidence to corroborate that a breath testing instrument, an intoxilyzer, was in proper working condition. Under Ohio law in a drunk driving case the prosecution is required to show that a breath testing device is in proper working condition. One of the conditions required to show tha a breath testing device is in properly working condition is to show that the breath testing device was properly calibrated with a simulator solution prepared by the chemists of the Ohio Department of Health. It is the job of the chemist of the Ohio Department of Health to check the simulator solution to make

sure it is accurate before it is dispensed to the police agencies in the State of Ohio.

If the prosecution fails to show that the simulator solution is accurate, then the results of the breath testing devise are inadmissible into evidence. In petitioner's trial Exhibit No. 3 was admitted into evidence over petitioner's objection. Exhibit No. 3 is set out in full and is attached to this petition in the Appendix C.

In this case Exhibit No. 3 was an affidavit signed by respondent's chemist purporting that the simulation solution was properly checked and that it was correct. The affidavit sought to prove that the intoxilyzer was in proper working condition so that the intoxilyzer could be admitted into evidence. Petitioner, of course, had no chance to cross examine this unsworn witness as to what scientific procedures and techniques he performed to come to the conclusion that the simulator solution used in petitioner's breath test was accurate. Instead, a piece of paper was admitted into evidence purporting that the simulator solution was accurate and that the breath testing device was in proper working condition. Petitioner, of course, had no opportunity to cross examine this witness.

In the Ohio State case of *State vs. Tims*, 9 Ohio State 2nd 136, the defendant was charged with statutory rape. During the course of the trial, the prosecution introduced a physician's report pursuant to ORC 2317.40 (Business Records as Evidence Act) instead of producing the physician. The defendant objected to this procedure. On appeal the Ohio Supreme Court reversed defendant's conviction stating that an accused has a constitutional right to cross examine his accuser. On pages 138 and 139 the court said:

"One of the basic and fundamental rights

guaranteed an accused by both the state and federal constitutions is the confrontation of the witnesses against him. Section 10, Article I of the Ohio Constitution provides that an accused has a right 'to meet the witnesses face to face.' As was said in *Pointer vs. Texas*, 380 U.S. 400, at 405:

'There are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous that in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constructional goal. In deed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.'

This right of confrontation includes the right of cross-examination of the person who is the actual witness against him. If applicable in a criminal case, the Business Records and Evidence Act denies him such right. The act permits the introduction of evidence in the form of records without requiring the presence of the person who actually made the examination. It is this person who is the actual witness against the accused, not the custodian, and it is this witness that the accused has the right to cross-examine to determine his qualifications and to determine whether the tests were made properly.

Here, the actual witness against the appellant was the examining physician whose findings

were incorporated in the record offered as evidence.

The effect of admitting hospital records in this type of case would be to allow the examining physician to testify without being subject to cross-examination.

The rules of civil procedure are not, therefore, applicable in a criminal case, whether such rules would serve to deprive an accused of a constitutional right to confront the witnesses used against him, the Business Records as Evidence Act is not applicable to criminal proceedings to allow the admission into evidence of hospital records showing the results of a physical examination of an alleged rape victim. This, of course, does not bar the introduction of such records where they are offered through and substantiated by the person who conducted such examination. *People vs. Lewis*, 294 Mich. 684, 293 N.W. 907.

In the instant case, appellant consistently denied that he had had sexual intercourse with the girl. The report substantiated the essential element of the state's case, the fact that the girl had been subjected to recent sexual intercourse. Its admission was clearly prejudicial to the appellant."

The Sixth Amendment right of the defendant "to be confronted with witnesses against him" had not received extensive interpretation prior to its incorporation within the Fourteenth Amendment in *Pointer vs. Texas*, 380 U.S. 300 p. 20. Since Pointer, the Court has decided more than a dozen cases involving confrontation issues. These cases

reveal both the potentially broad impact of the confrontation clause and the Court's emphasis upon a functional analysis relating each decision to its particular procedural setting.

A substantial number of confrontation cases have concerned the admissability of hearsay. The Court has stressed that the crucial question under the confrontation clause is not compliance with common law hearsay rules, but fulfilment of the "mission of the confrontation clause to advance the accuracy of the truth determining process * * * by assuring that the trier of fact has a satisfactory basis for evaluating the truth of a prior statement." *Cal. vs. Green*, 399 U.S. 149 (1970). Thus, the states have leeway to recognize new exceptions to the prohibition against hearsay evidence if those exceptions assure defendant an adequate opportunity for cross-examination. *Cal vs. Green*, supra (upholding a state rule that inconsistent prior statements of a witness now subject to cross-examination may be admitted to prove the truth of the matters asserted therein). On the other hand, well established hearsay exceptions will not be acceptable when applied so as to unnecessarily subvert the opportunity for cross-examination. For example, the Court has accepted as consistent with the confrontation clause the hearsay exception permitting admission of prior testimony of a currently unavailable witness, but has stressed that the testimony must have been obtained at a prior proceeding where counsel had "full and adequate opportunity for cross-examination." Compare *Cal. vs. Green*, supra (prior preliminary hearing testimony admissible since counsel had full cross-examination rights at the preliminary hearing) with *Pointer vs. Texas*, supra (preliminary hearing testimony inadmissible where defendant lacked counsel to assist in cross-examination at the hear-

ing). The Court also has stressed that the witness must truly be unavailable for the prior testimony exception to be applied. While permanent transfer to a foreign country was sufficient to establish unavailability, *Mancusi vs. Stubbs*, 408 U.S. 204 (1972), imprisonment in a federal prison was not sufficient when the state had made no effort to secure the prisoner's appearance through the cooperation of federal authorities, *Barber vs. Page*, 390 U.S. 719 (1968).

The confrontation clause has also been recognized as having a significant bearing upon the proper scope of cross-examination. Here again, rulings tend to be tied to the facts of the particular case. *Smith vs. Ill.*, 390 U.S. 129 (1968), found a constitutional violation when defendant was not allowed to ask the principal prosecution witnesses, a police informer, either his correct name or address. *Davis vs. Alaska*, 415 U.S. 308 (1974), found that the trial judge committed constitutional error in denying defense the opportunity to raise a key witness' juvenile delinquent probationary status. The Court noted that the state has a legitimate interest in protecting the anonymity of juvenile offenders, but that interest could not be utilized to bar cross-examination as to a factor obviously relevant to the witness' possible improper motivation.

Perhaps the most unique application of the confrontation clause has been to the out-of-court presentation of information to the jury. Arguably such presentations easily could be invalidated upon due process grounds analogous to those cited in the prejudicial pretrial publicity cases (p. 56). However, if the source supplying the out-of-court information is treated as a witness, the confrontation clause provides another ground for objec-

tion. That approach was taken in *Parker vs. Gladden*, 385 U.S. 363 (1966), where a bailiff casually commented to the jury, "ch that wicked fellow, he is guilty" and, "if there is anything wrong [in rendering a guilty verdict] * * * the Supreme Court will fix it." The Court concluded that defendant had been denied the right of confrontation since the bailiff had become, in effect, a secret witness. Compare *Turner vs. La.*, 379 ,U.S. 466 (1965) where the Court relied solely on the impartial jury rationale in reversing a conviction when two deputy sheriffs, who were key prosecution witnesses, were placed in charge of the jury and fraternized with them throughout the trial.

VIII

CONCLUSION

Petitioner asserts that if this honorable court does not grant the writ prayed for, the State of Ohio can in both felony and misdemeanor cases use hearsay documents to prove the truth contained therein to prove the guilt of defendants.

In the case in bar, especially in drunk driving cases, the use of exhibits such as exhibit number three, is now widely used in Ohio by police authorities. They are used to substantitate that the simulator solution used to prove that the breath testing devices are in proper working condition to convict defendants of driving under the influence.

It is important to note that if the prosecution is unable to show that the breath testing device is in proper working condition, the breath testing device cannot be admitted into evidence. The breath testing device if admitted into evidence can show a certain percentage of

alcohol in the defendant's bloodstream and ultimately the jury can be instructed that a percentage of .10 per cent in the bloodstream constitutes a rebuttable presumption that the defendant is guilty of driving under the influence. It is, therefore, quite critical that the prosecution show that the breath testing device is properly calibrated. To calibrate the breath testing device under Ohio law, a simulator test is performed on a breath testing device used in a defendant's case every ten days or every ten tests. The simulator solution consists of ethyl alcohol injected into the device and should give a pre-determined test score to verify the accuracy of the breath testing device. It is, therefore, quite critical that the simulator solution be accurate. If the simulator solution is not accurate, then the test conducted on the defendant is not accurate and the breath test result is not admissible into evidence. The key, therefore, is the accuracy of the simulator solution prepared by chemists of the Ohio Department of Health.

In the case in bar the petitioner, like other defendants, cannot cross examine the chemists as to the accuracy of the simulator solution prepared by them in the form of an affidavit. Petitioner contends such an affidavit, as exhibit number three, denies the petitioner of his 6th Amendment right to cross examine an unseen witness against him.

If this honorable court does not put a stop to this unconstitutional action of the State of Ohio, it will not be long before criminal jury trials are conducted by hearsay and defendants will be prohibited from confronting their

accusers and the rule in *Pointer vs. Texas* will mean nothing.

RESPECTFULLY SUBMITTED,

William A Garrett

WILLIAM A. GARRETT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio was sent by United States first class mail, postage prepaid, to counsel representing the parties to this proceeding this 16 day of July 1979, said service being made on the City of Sylvania Prosecuting Attorney representing the City of Sylvania, Ohio.

William A Garrett

WILLIAM A. GARRETT

APPENDIX A

THE SUPREME COURT OF OHIO

No. 79-323

1979 TERM

To wit: April 20, 1979

THE STATE OF OHIO,
City of Columbus.
State of Ohio,

Appellee,

vs.

William A. Garrett,

Appellant.

APPEAL FROM THE COURT OF APPEALS

for Lucas County

This cause, here on appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

.....Clerk

.....Deputy

APPENDIX B

IN THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

State of Ohio

Plaintiff-Appellee

vs.

William A. Garrett

Defendant-Appellant

C.A. No. L-78-095

S.M.C. No. 77-C-4190

OPINION

Decided: February 9, 1979

: : :

Mr. William A. Garrett, Attorney for Appellant.
Mr. Scott Ramey, Attorney for Appellee.

: : :

POTTER, P.J. The defendant, William A. Garrett, was charged with the offense of driving while intoxicated, contrary to the provisions of R.C. 4511.19. He was given an intoxilyzer breath test and registered .16. R.C. 4511.19 provides that if there is a concentration of ten-hundredths of one percent or more by weight of alcohol in a defendant's blood, it shall be presumed that he was under the influence of alcohol. Defendant requested a second intoxilyzer test which was refused.

After a jury trial the defendant was found guilty. From the verdict and judgment the defendant appeals and has filed ten assignments of error. Although we find all assignments of error not well taken, we find assignments of error Nos. 4 and 7 to contain the most novel issues of law and comment on them first.

Assignments of error Nos. 4 and 7 are as follows:

"*4. The intoxilyzer test is not a chemical test as required by ORC 4511.91. Admission of said test constituted reversible error.*

"*7. The People failed to establish the health regulation that the intoxilyzer was an approved testing device as set down by the Ohio Department of Health.*"

Defendant-appellant asserts that the Omicron Intoxilyzer is, "an infrared electromagnetic spectrum" analysis and is not a chemical test as required by R.C. 4511.19.

In the case of *State vs. Moore* (1973), Del. Super. Ct. 307 A. 2d 548, that court described the operation of the Omicron Intoxilyzer as follows:

"After some rather elementary preliminary procedures performed by the operator of the device the suspect is required to blow his breath into it through a small tube.

"A given wave length of infra red light is caused to pass through the suspect's breath as it passes through the device. If the breath contains ethyl alcohol, a part of the light will be absorbed by the ethyl alcohol. The amount of light thus absorbed indicates the amount of ethyl alcohol present in the breath. The device then translates the amount of ethyl alcohol present in the breath to the amount present in the blood and the result is flashed on a small screen which is part of the device and printed on a card which the operator had previously inserted in the device."

That court held that the test in question was a chemical analysis, regardless of the fact that the procedure was purely mechanical.

This court had an opportunity to comment on a similar assignment of error and argument in the case of *Monak vs. Registrar*, Bureau of Motor Vehicles, Court of Appeals, Ottawa County, No. 78-CV-17, November 24, 1978. In that case we said the following:

"This assignment of error is not well taken. Appellant alleges that the measurement of the alcohol content of his breath by the intoxilyzer is not a chemical test since the intoxilyzer measures alcohol content by using light rather than chemicals. We assume that this characterization of the machine is correct, since it is not disputed in the record. Nonetheless, we find that the intoxilyzer test is a chemical test, within the meaning of R.C. 4511.191, since the intoxilyzer makes a chemical analysis of the breath; whether it does so by chemical or physical means is irrelevant."

In the Monak case, supra, appellant was appealing from an adverse decision pursuant to the filing of his petition under R.C. 4511.191(F), the implied consent statute. However, the reasoning of this court in that case and our holding is equally applicable to the case sub judice. We, therefore, find assignment of error No. 4 not well taken.

As to assignment of error No. 7, the defendant-appellant maintains that prior to trial he objected to his test result being submitted in evidence because the Ohio Department of Health did not list and approve the intoxilyzer as a breath-testing device. Inferentially, appellant also maintains that the State had the burden to establish reliability of the test and the admissibility of the score.

In a prior case involving the MR-7 moving radar device,

see *State s. Shelt* (1976), 46 Ohio App. 2d 115, we did require expert testimony before we accepted evidence based on MR-7 readings. The State asserts that the situation is not analogous, and we agree. The Legislature has provided in R.C. 4511.19 that a court may admit evidence of the concentration of alcohol in a defendant's blood as shown by chemical analysis of the defendant's breath or other bodily substance. The bodily substance must be analyzed in accordance with methods approved by the Director of Health. *Cincinnati vs. Duhart* (1974), 41 Ohio App. 2d 127, stands for the proposition that a court may take judicial notice of the rules and regulations adopted by the Director of Health. The intoxilyzer is an approved breath-testing instrument. See State of Ohio, Department of Health, Alcohol, Testing, Approval and Permit Program HD-102, "Breath Tests". The State called the trial court's attention to the regulations; the defendant produced no testimony that the Omicron Intoxilyzer was unreliable. See *State vs. Moore*, supra, and *Best vs. State* (1974), Del. Super. Ct. 328 A. 2d 141, to the affect that, absent testimony by the defendant to the contrary, the court may assume that it is reliable. Absent any showing by the defendant that the instrument was unreliable, we find, as we did assignment of error No. 4, assignment of error No. 7 not well taken.

We next consider assignments of error Nos. 1 and 2. They are as follows:

> "1. *The test result of appellant should not have been admitted into evidence because the people failed to establish that the intoxilyzer was in proper working condition.*
>
> "2. *Admission of exhibit No. 3 into evidence to esatblish that the intoxilyzer was in proper working condition was hearsay.*"

Defendant maintains that the instrument was not working properly for the reason that a test solution run through the machine should have tested 0.102%. It tested 0.106%. This contention is not well taken as official instruments #008 of the Alcohol Testing Program per regulation HD-1-04(A) permits a difference of no greater than +0.005% between the instrument analysis and the solution. The machine in question fell within the limits tolerated and, therefore, was in proper working condition. The defendant questions the use of the simulator solution as there was no showing as to when the solution was first used. The evidence shows the solution was prepared on August 30, 1977, and used on October 4, 1977. This assignment of error is not well taken.

Assignment of error No. 2 attacks the admissibility of Exhibit 3. This exhibit was used to prove that the simulator solution was prepared and checked out by the Department of Health within 90 days of its use.

This exhibit is admissible as an exception to the hearsay rule under authority of *State vs. Walker* (1978), 53 Ohio St. 2d 192. The syllabus of that case is as follows:

> "In a criminal prosecution for violation of R.C. 4511.19 or a municipal ordinance relating to driving a vehicle while under the influence of alcohol, certified copies of pages from a permanent log book maintained by a police department in accordance with regulations promulgated by the Director of Health pursuant to R.C. 3701.143 are admissible in evidence as an exception to the hearsay rule under R.C. 2317.42."

That case refers to the admissibility of a log book. Exhibit 3 falls within the rationale of the Walker decision. Exhibit 3 was a document signed by Trooper Robert W. Gochoel, Jr., of the Ohio Department of Health to the effect that the simulator solution was prepared and approved by the Ohio Department of Health within the 90-day prescribed period. It also contained a record of the analysis of the calibration of the solution and the batch number, and stated it was prepared for the Toledo Post of the Ohio State Patrol on the 30th of August 1977. In Walker, supra, we find and quote the applicable language, as follows:

"Determination of the applicable exception to the hearsay rule directly affects the outcome in this cause, since, in authenticating the document during trial the prosecution did not call as a witness the custodian, supervisor, or maker of the record as required under R.C. 2317.40, but rather merely submitted a certified copy of the report as permitted under R.C. 2317.42.

"R.C. 2317.42 provides:

" 'Official reports made by officers of this state, or certified copies of the same, on a matter within the scope of their duty as defined by statute, shall, insofar as relevant, be admitted as evidence of the matters stated therein.'

"In discussing the necessity for the official-reports-as-evidence exception, this court noted that:

" 'The General Assembly, recognizing the need for an authority that "would make admissible various sorts of reports dealing with matters

seldom disputable and only provable otherwise at disproportionate inconvenience and cost" (5 Wigmore on Evidence [3 Ed.], 699 Section 1672), enacted Section 2317.42, Revised Code, thereby greatly facilitating the production of evidence with little chance of it being untrustworthy.' *State vs. Colvin* (1969), 19 Ohio St. 2d 86, at 89. As commented in 5 Wigmore on Evidence (3 Ed.), 618, Section 1632:

" '* * * When it is a part of the duty of a public officer to make a statement as to a fact coming within his official cognizance, the great probability is that he does his duty and makes a correct statement. The consideration that regularity of habit, a chief basis for the exception for regular entries * * *, will tend to this end is not here an essential one; for casual statements, such as certificates, may be admissible, as well as a regular series of entries in a registry. The fundamental circumstance is that an official duty exists to make an accurate statement, and that this special and weighty duty will usually suffice as a motive to incite the officer to its fulfillment.'

"Applying the above statutory provisions to the cause at bar, the court finds that portions of the permanent log book are admissible under the official-reports-as-evidence exception."

We also quote the following from page 200:

"In conclusion, the court finds that the documentary evidence sub judice qualifies under the Official Reports as Evidence Act pursuant to R.C. 2317.42, that the document is sufficiently

reliable to warrant its admissibility in evidence despite the fact that the declarant is not present at trial, and that the holding of Tims, supra, is not controlling given the facts of this cause."

Assignment of error No. 2 is not well taken.

Assignment of error No. 3 is as follows:

"3. *Failure on the part of the People to produce the repair and maintenance logs denied appellant due process of law and violated the Ohio Department of Health's own rules and regulations.*"

Defendant argues that there should be a repair and maintenance log book. However, only one log book is required by the Department of Health Rules. It was produced. The intoxilyzer in question at the time of trial had had no repairs or maintenance performed. The testimony was to the effect that if the calibration test is not true, then the machine would not be used. Assignmet of error No. 3 is not well taken.

Assignment of error No. 5 is as follows:

"5. *That reversible error was made when the appellant requested that a second intoxilyzer test be given to him and the owcer refused said second test.*"

This assignment of error is not well taken. R.C. 4511.19(C) is as follows, in pertinent part:

"The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to

any administered at the direction of a police officer, and shall be so advised. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or test taken at the direction of a police officer."

Defendant-appellant did not seek to avail himself of R.C. 4511.19(C) tests.

Assignment of error No. 6 is as follows:

"6. *The court committed reversible error when it allowed the witness to use his notes and testify to alleged observations when the witness could not remember the details.*"

We find no error in permitting the officer to refresh his memory by referral to his notes. Assignment of error No. 6 is not well taken.

Assignment of error No. 8 is as follows:

"8. *The trial court should have granted appellant's motion to produce the intoxilyzer before the jury.*"

In a case wherein the present counsel represented a different defendant, the same assignment of error was asserted. See *City of Toledo vs. Huff*, C.A. No. L-76-283, March 25, 1977.

We held then that this assignment of error was not well taken. We apparently did not convince counsel of the merit of our holding. We will try to do so again and, consistent with our prior decision, we hold assignment of error No. 8 is not well taken.

Assignment of error No. 9 is as follows:

"9. *Failure to record the first breath sample of appellant constituted error.*"

Defendant's first effort in breathing into the machine was apparently not strong enough to activate the machine. It could not, therefore, be recorded. This assignment of error is not well taken.

Assignment of error No. 10 is as follows:

"10. *Failure to give reckless operation of a motor vehicle and improper lane usage as a lesser included offense constitutes error.*"

In *City of Akron vs. Kline* (1956), 165 Ohio St. 322, the Ohio Supreme Court held at page 324 the following:

> "Evidence which would be sufficient to sustain a conviction for reckless driving would not be sufficient to sustain a conviction for operating or being in control of a vehicle while intoxicated. Being under the influence of intoxicating liquor is not necessarily an element of the former offense, and reckless operation is not an element of the latter offense."

See also *City of Toledo vs. Huff*, supra. Likewise, improper lane usage is not a lesser included offense. Assignment of error No. 10 is not well taken.

Finally, apart from the score the defendant made on the intoxilyzer, we find abundant probative evidence from which the jury could find beyond a reasonable doubt that the defendant was driving while intoxicated, contrary to R.C. 4511.19.

The judgment of the Sylvania Municipal Court is

affirmed at appellant's costs. Cause remanded for execution of sentence and for costs.

JUDGMENT AFFIRMED.

Brown and Wiley, JJ., concur.

Judge Frank W. Wiley, Retired, Sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

APPENDIX C

EXHIBIT 3

OHIO STATE HIGHWAY PATROL CRIME LABORATORY

CHEMISTS: Sgt. Robert L. Ely
Tpr. Robert W. Gochoel, Jr.

REPORT OF ANALYSIS: CALIBRATION SOLUTION, REGULATION HD-1-04, OHIO DEPARTMENT OF HEALTH

BATCH NO. 77-05

BOTTLE NO. 77-48-05

DATE August 30, 1977

PREPARED FOR TOLEDO POST

To be used in Simulator for calibration of Intoxilyzer breath testing equipment.

(This calibration solution contains 1.23 ma/ml ethyl alcohol in distilled water and when used according to manufacturer's stated methods will produce a reading of 0.102% blood alcohol in the above named breath testing instru-

ment when that instrument is in proper working condition for a period of three (3) months from the date of first use.)

AFFIDAVIT

STATE OF OHIO, FRANKLIN COUNTY:

I hereby certify that the calibration solution denoted by this report has been analyzed by me and found to contain ethyl alcohol in the amount denoted and constitutes an appropriate calibration solution as required under regulation HD-1-04 Ohio Department of Health, Calibration.

Tpr. Robert W. Gochoel, Jr.
Laboratory Technician
State of Ohio
Department of Health
Laboratory Technician Permit No. 296

Laboratory Technician permit has been valid from date of issuance on September 24, 1974 through September 15, 1977.

Sworn to and signed in my presence this
15th day of September, 1977.
Notary Public D. A. Lawrence

Notary Seal